

# Exhibit 336

*United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al.*  
*v. Dey, Inc., et al.*, Civil Action No. 05-11084-PBS

**Exhibit to the August 28, 2009 Declaration of Sarah L. Reid in Support  
of Dey's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

1 NO. GV002327  
 2 THE STATE OF TEXAS ) IN THE DISTRICT COURT  
 3 ex rel. )  
 4 VEN-A-CARE OF THE )  
 5 FLORIDA KEYS, INC., )  
 6 Plaintiff(s), )  
 7 VS. ) TRAVIS COUNTY, TEXAS  
 8 DEY, INC.; ROXANE )  
 9 LABORATORIES, INC., WARRICK )  
 10 PHARMACEUTICALS CORPORATION, )  
 11 SCHERING CORPORATION, )  
 12 SCHERING-PLOUGH CORPORATION, )  
 13 LIPHA, S.A., MERCK-LIPHA, )  
 14 S.A., MERCK, KGAA, and EMD )  
 15 PHARMACEUTICALS, INC., )  
 16 Defendant(s). ) 53RD JUDICIAL DISTRICT

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18 ORAL AND VIDEOTAPED DEPOSITION OF

19 TODD GALLES

20 February 6, 2003

21 \*\*\*\*\*

22 ORAL AND VIDEOTAPED DEPOSITION OF TODD GALLES,  
 23 produced as a witness at the instance of the  
 24 Plaintiff(s), and duly sworn, was taken in the  
 25 above-styled and numbered cause on February 6th, 2003,  
 from 9:07 a.m. to 7:20 p.m., before Cynthia Vohlken,  
 CSR in and for the State of Texas, reported by machine  
 shorthand, at the Napa Valley Marriott Hotel, 3425  
 Solano Avenue, Napa, California pursuant to the Texas  
 Rules of Civil Procedure.

1 recommendations and, you know, pricing decisions, you  
2 know, were generally a senior management decision.

3 Q. Mr. Galles, I'm going to hand you what's been  
4 previously marked in these depositions as Exhibit  
5 Number 72, which is a memorandum from May 30, 1995. I  
6 believe everyone here at the table has got a copy of  
7 this, but I've got additional ones if anybody needs  
8 one. Have you ever seen that document before?

9 A. Yes.

10 Q. Did you see it at the time it was written or  
11 thereabouts?

12 A. I believe not. I think I've only seen this  
13 through the discovery of materials for this purpose.

14 Q. Do you recall when is the first time that you  
15 saw the memo?

16 A. As I recall, the first time I saw the memo  
17 was when we pulled our files as part of the discovery  
18 and had to make, whatever, five copies of everything  
19 and ship them to the lawyers.

20 Q. Do you recall approximately what date that  
21 was?

22 A. I would -- I'm just calculating maybe 1997.  
23 It seemed like it was probably a couple of years while  
24 I was still there that that happened.

25 Q. When you say "we," who are you referring to?

1           A.     The patient is getting a lot more benefit  
2     from a unit-dose than from a multi-dose, and so I  
3     don't think you can take that out of context. A  
4     unit-dose product offers a sterile product with  
5     benzalkonium chloride. I mean, there's all kinds of  
6     benefits that a patient is getting as a better  
7     product. So it's not pure price, it's price and  
8     feature benefit to a patient and, you know, that's a  
9     decision that people have to make --

10                   MR. WINTER: Objection --

11           A.     -- all along.

12                   MR. WINTER: -- nonresponsive.

13                   MR. FLECKMAN: One -- hold on one  
14     second. I don't mind you making an objection. I do  
15     mind you interrupting his answer. Let's just make  
16     sure that the witness has finished his answer.

17                   THE WITNESS: (Nodded head  
18     affirmatively).

19                   MR. FLECKMAN: Okay. Have -- have you  
20     finished your answer?

21                   THE WITNESS: Yes.

22                   MR. FLECKMAN: Okay.

23                   MR. WINTER: Would you repeat my  
24     previous question, please?

25                   (Requested portion was read)

1 up by people who would pick up their intra-office  
2 mail.

3 A. Correct.

4 Q. Okay. And that was a standard and routine  
5 function at Dey for disseminating information?

6 A. Yes.

7 Q. Okay. Now, the first time that you ever saw  
8 the Helen Burnham memo, that is, Exhibit 72, is in  
9 1997 when you were going through some old files in the  
10 administration building, correct?

11 A. Yes.

12 Q. Okay. Can you as you sit here today say that  
13 you have any personal knowledge whatsoever as to the  
14 creation of that memorandum by Ms. Burnham? Any  
15 personal knowledge.

16 A. I have no personal knowledge.

17 Q. Of that memorandum?

18 A. Only from, you know.

19 Q. I'm not talking about after 1997.

20 MR. PITRE: Excuse me. I thought we  
21 were supposed to let the witness finish before you --  
22 he was in the middle of answering the question.

23 Q. (BY MR. FLECKMAN) You may answer.

24 MR. PITRE: Will you allow him to  
25 finish?

1 reporting an inflated WAC price to anyone on one of  
2 its products?

3 MR. PITRE: Objection, form.

4 MR. WINTER: Objection, form.

5 A. No.

6 Q. (BY MR. FLECKMAN) The -- tell me or tell the  
7 jury how you reported WAC prices on Dey's products  
8 once you assumed that function. Where did you get the  
9 WAC prices from? Was it a price sheet that had been  
10 approved by the pricing committee?

11 A. Marketing, myself or whomever, would make a  
12 recommendation after looking at what the competitors'  
13 prices were. The pricing committee would approve the  
14 pricing. We'd insert it in the launch letters and the  
15 pricing database letters and the state Medicaid  
16 formulary letters and distribute them.

17 Q. Did any circumstance ever come to your  
18 attention where you had to correct prices that a  
19 database reporting service had, that a data reporting  
20 service had in its -- in its database?

21 A. There periodically would be I guess reports  
22 or something where they -- like a spreadsheet or  
23 something would come from the pricing database and  
24 you'd look over it to make sure there weren't errors.

25 Q. Okay. And did you occasionally encounter

1 generic competitors for its products?

2 A. That's my phone. Sorry. No.

3 Q. Tell us what you mean by that when -- when  
4 you say it did not. What -- what was -- what was it  
5 attempting to do?

6 A. We would price -- in the case of, say,  
7 Ipratropium we priced at Roxane pricing and it  
8 wasn't -- if you came in and undercut them you just  
9 start a pricing spiral which wouldn't make sense for  
10 anybody so you came in and you priced basically at the  
11 same level.

12 Q. Over time did Dey report declining WAC prices  
13 to the reporting services and the Medicaid  
14 authorities?

15 A. Yes.

16 Q. Do you recall in your experience at Dey  
17 outside of maybe some isolated situation of shortage  
18 of materials, shortage of raw materials, where Dey  
19 raised its WAC prices on any product?

20 A. Not on any of the generics.

21 Q. That's what I'm referring to.

22 A. Yeah. No.

23 Q. How about the Albuterol sulfate, did it raise  
24 its WAC prices on the Albuterol sulfate?

25 A. No.



1 Exhibit 342.

2 MR. FLECKMAN: 342? Because this is  
3 not -- I don't have 342 here.

4 (Discussion off the record)

5 Q. (BY MR. FLECKMAN) Okay. Let me hand you  
6 what's been marked Exhibit 342 in Eve Gmeiner's --  
7 well, that was used in Eve Gmeiner's deposition. And  
8 I'll represent to you that she has looked at that and  
9 identified that as a correction of WACs on Dey  
10 products for First DataBank. Would you look it over  
11 and tell me whether this seems to you to be Eve  
12 Gmeiner's handwriting on here?

13 MR. WINTER: Objection, form.

14 Q. (BY MR. FLECKMAN) Take a look at the second  
15 page.

16 MR. WINTER: Which exhibit, Steve?

17 MR. FLECKMAN: The same one we were just  
18 talking about, 342.

19 A. Well, the first note on the 591 page --

20 Q. (BY MR. FLECKMAN) Uh-huh.

21 A. -- that's me, fax to Beth Rader at First  
22 DataBank. And there must have been red ink on it, and  
23 so that was, you know, will the red fax, if not copy  
24 first, and then -- then there's the signature saying  
25 it was done.



1 Q. Okay. And let me see if I can piece together  
2 who that signature might be. I think we -- we have  
3 encountered somebody, but I'm momentarily blanking.  
4 Who would that be, if you recall? If you don't  
5 recall, don't worry about it.

6 A. Yeah, I don't know.

7 Q. Is this the typical instruction you would  
8 give for something to be faxed to a price reporting  
9 service?

10 A. Yeah.

11 Q. Okay. Is this a typical way that you would  
12 be assured that it had been faxed? Somebody would  
13 just make a note done and date it?

14 A. Yeah.

15 Q. Nothing unusual about that to you?

16 A. No.

17 Q. Okay. Take a look at the second page. Down  
18 at the bottom. Do you recognize Eve Gmeiner's  
19 handwriting?

20 A. Yeah.

21 Q. Okay. Take a look at the pages which  
22 represent the corrected schedules. Do you recognize  
23 your handwriting for the label color codes on the  
24 left-hand margin?

25 A. Yes.

1 Q. Okay. Do you recognize Eve Gmeiner's  
2 handwriting on here for the corrections on the prices  
3 themselves?

4 A. Looks like hers, yeah.

5 Q. Okay. Take a look on the next to last page  
6 for the Albuterol 25's that we've been looking at.  
7 And what do you find there as the listed price for  
8 First DataBank for the Albuterol 25's that has been  
9 scratched through?

10 A. It looks like 24.75, maybe.

11 Q. Okay. And that looks like it corresponds to  
12 the price in Helen Burnham's fax, doesn't it?

13 A. Yes.

14 Q. Okay. Now, look under there what -- what Eve  
15 Gmeiner has written and read to the jury what Eve  
16 Gmeiner has written as a correction.

17 A. 14.50 effective February 1, '95.

18 Q. Okay. So that's a correction that was faxed  
19 at your instructions to First DataBank to Beth Rader,  
20 correct?

21 A. Correct.

22 Q. And that was indicated by one of the Dey  
23 employees as having been done on December 4, 1995 on  
24 the first page, correct?

25 A. Right.

1 Q. Have you testified today to the truth to the  
2 best that you can recall it?

3 A. Yes.

4 Q. Is there any point of information either  
5 during the course of my examination or during the  
6 course of the plaintiffs' examination, Mr. Winter or  
7 Mr. Pitre, that you would like to clarify at this  
8 point other than as you may have clarified during the  
9 course of the deposition already?

10 A. Not at this time.

11 Q. Take a look at Ms. Burnham's memo, 72. Well,  
12 don't even bother to look at it. Let me just ask you  
13 a question. Do you believe that WAC is representative  
14 of Dey's published wholesale list prices?

15 MR. WINTER: Objection, form.

16 Q. (BY MR. FLECKMAN) While you were with Dey?

17 A. Yes.

18 Q. Do you believe that that was well-known  
19 within the marketing department at Dey?

20 A. Yes.

21 Q. Do you believe that Helen Burnham knew that?

22 A. Yes.

23 Q. Why was the pricing sheet called a cheat  
24 sheet, the one that went to the sales force? And let  
25 me just hand this to you.

1 This is getting to be abusive, Mr. Pitre. Move on.

2 Q. (BY MR. PITRE) Go ahead.

3 A. No.

4 Q. Good. Did you read the sentence here that  
5 says, "WAC is not representative of our published  
6 wholesale list prices"? Did you read that?

7 A. When?

8 Q. When you found this in your file.

9 A. I'm sure I did, you know.

10 Q. Did you agree with it?

11 A. What does it say?

12 Q. "WAC is not representative of our published  
13 wholesale list prices."

14 A. No, I don't agree with it.

15 Q. Did you bring that to anybody's attention?

16 A. No.

17 Q. Ms. Burnham, I believe you indicated she's  
18 the godmother of one of your children?

19 A. Yes.

20 Q. Do you believe that she's an honest person?

21 A. Yes.

22 Q. Do you believe that she is somebody that  
23 tells the truth?

24 A. Yes.

25 Q. Do you have any reason to doubt at least her